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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 236

JOSEPH K. TAUSSIG, JR., *Petitioner,*

v.

ROBERT S. MCNAMARA, Secretary of Defense, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and regulations involved	3
Statement	3
Reasons for granting the writ	6
Appendix A—Judgment below	1a
Appendix B—Constitutional provisions, statutes and regulations involved	1a

AUTHORITIES

CASES:

American School of Magnetic Healing v. *McAnnulty*, 187 U.S. 94	7
Baggett v. *Bullitt*, — U.S. —, 32 L.W. 4425 (June 1964)	18
Baker v. *Carr*, 369 U.S. 186	17
Chapman v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621	8
Cole v. *Young*, 351 U.S. 536	7
Connolly v. *General Construction Co.*, 269 U.S. 385, 392	15
Cramp v. *Board of Public Instruction*, 368 U.S. 278	18
Gillilan v. *U. S.*, (2d Cir.) 288 Fed. 2d 796	17
Green v. *McElroy*, 360 U.S. 474	18
Harmon v. *Brucker*, 355 U.S. 579	8
Hilton v. *Sullivan*, 334 U.S. 323	8
Hynes v. *Grimes Packing Co.*, 337 U.S. 86	18
Joint Anti-Facist Refugee Committee v. *McGrath*, 341 U.S. 123	7
Kennedy v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 Fed. 2d 181	5, 6

Page

Kent v. *Dulles*, 357 U.S. 116 7
Morganthau v. *Barrett*, 71 U.S. App. D.C. 148, 108 F. 2d 141 11
Perkins v. *Elg*, 307 U.S. 325 7
Peters v. *Hobby*, 349 U.S. 331 7
Philadelphia Co. v. *Stimson*, 223 U.S. 605 .....7, 17
Rabinowitz v. *Kennedy*, — U.S. —, 32 L.W. 4264 (March 30, 1964) 7
Ramspeck v. *Fed. Trial Examiners*, 345 U.S. 128 .. 8
Service v. *Dulles*, 354 U.S. 363 7
Shields v. *Utah R.R. Co.*, 305 U.S. 177 .....7, 17
Stark v. *Wickard*, 321 U.S. 288, 290 7
Truax v. *Raich*, 239 U.S. 33 7
United Public Workers v. *Mitchell*, 330 U.S. 75 7
U.S. v. *Lovett*, 328 U.S. 303 17
United States v. *Universal CIT Credit Corp.*, 344 U.S. 218, 221, 222 15
Vitarelli v. *Seaton*, 359 U.S. 535 7
Waite v. *Macy*, 246 U.S. 606 8

STATUTES:

18 U.S.C. 281 .....10, 11, 2a
Military Appropriation Act of 1941, Act of June 13, 1940, 54 Stat. 350, 355 .....12, 3a
Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361) 12, 3a

REGULATION:

Department of Defense Directive 5500.7, Dated May 17, 1963, 28 Fed. Reg. 5666 (1963) 2, 3, 5, 8

MISCELLANEOUS:

Hearings, Subcommittee for Special Investigation, House Committee on Armed Services, 86th Cong., 1st Sess., at 944 (1959) (the Herbert committee) .. 11
Op. JAGN JAG:134.2 PEH:AN May 16, 1960; Op. JAGN 134.1:RWC:sb July 12, 1962 11
Reference Guide to Employment Activities of Retired Naval Personnel, published by the Department for the Navy, Office of the Judge Advocate General, 21 March 1963, p. 21 11

Page

Hearings Before the Subcommittee for Special Investigation, House Committee on Armed Services, 86th Cong., 1st Sess. (1959) 11, 15, 16
H. Rep. No. 2330, 76th Cong., 3rd Sess. 12, 13
Hearing on Conflicts of Interest Before the Committee on the Judiciary, 87th Cong., 2d Sess. 29 (1962) 16
Borchard, *Declaratory Judgments* (2d ed., 1941) ... 7
Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445 (1943) 7
Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 Cornell L.Q. 3 (1954) 7
Davis, *Suing the Government by Suing an Officer*, 29 U. of Chi. L. Rev. 435 (1962) 7
Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) 7

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JOSEPH K. TAUSSIG, JR., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 6, 1964.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit entered no opinion. The United States District Court for the District of Columbia entered no opinion in granting defendants' motion for summary judgment and dismissing the action. The

opinion of the District Court in denying petitioner's motion to convene a three-judge court is reported at 219 Fed. Supp. 757, (JA 28 et seq.).

JURISDICTION

The judgment of the court below was entered on February 6, 1964. The jurisdiction of this court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of a regulation issued by the Secretary of Defense (DOD 5500.7, dated May 17, 1963) barring retired officers of the regular military service permanently from the business of representing persons in the sale of anything to the service from which they were retired and requiring them to file a statement reciting that their duties do not involve selling to the government in violation of the statutes and policies set forth in the said regulation is in excess of an in contradiction to the statutory and constitutional authority of the Secretary of Defense.

2. Whether 18 U.S.C. 281 as applied to petitioner is unconstitutional as violative of his rights under the Fifth Amendment.

3. Whether a suit against the Secretary of Defense, the Secretary of the Navy, and the Attorney General by a retired officer of the regular Navy seeking judgment declaring that the said directive and the enforcement thereof is in excess of and in contradiction to the statutory and constitutional authority of these officials is an unconsented suit against the United States.

4. Whether the cause presents a justiciable case or controversy and whether the petitioner has standing to sue in the premises.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved are set forth in Appendix B, *infra*, pp. 1a to 8a. They are:

1. The constitutional provision involved is Amendment V, Constitution of the United States.

2. The statutes involved are 18 U.S.C. 281, as amended; Act of June 13, 1940, 54 Stat. 350, 355; Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361).

3. The regulation involved is Department of Defense Directive 5500.7, dated May 17, 1963, 28 Fed. Reg. 5666 (1963).

STATEMENT

This controversy arose because of the promulgation by the Secretary of Defense of a directive prohibiting retired officers of the regular military services permanently from representing anyone in the sale of anything to the service in which they hold their retired status (DOD Directive 5500.7, 28 Fed. Reg. 5666 (1963)). The petitioner, Joseph K. Taussig, Jr., is a retired officer of the regular Navy who was retired on August 31, 1954 with the rank of Captain for permanent disability (80%) resulting from wounds received in the Japanese attack on Pearl Harbor (JA 38). His business and means of livelihood is that of representing firms, corporations, and companies which sell materials and supplies to the departments of the Armed Services of the United States. The effective performance of this business or profession requires that he contact officers and employees of the federal depart-

ments for obtaining and negotiating contracts, prices, cost allotments, or other terms of contract activity or liaison activity looking forward to the ultimate consummation of sales (JA 43, 44). The directive hereinabove mentioned prohibits him from conducting his business with the Department of the Navy (JA 44). The prohibition has in the past caused and is presently causing him serious financial loss, rendering him uncompetitive with other citizens of the United States who are not so prohibited (JA 44) and occasioning the loss of clientele (JA 43). He is also harmed because in the conduct of his business he is unable to tell by reason of inter-service connection in procurement matters whether or not he is, in given circumstances constantly arising, in violation of law (JA 44). Specifically, the prohibition contained in the directive arises because the Secretary of Defense in the directive interprets a provision of the criminal code, 18 U.S.C. 281, as meaning that the Congress has declared such "selling" by retired officers to be a criminal offense. The directive itself not only prohibits the petitioner from engaging in such activity but requires (see § XIII D2a, App. B, *infra*, p. 5a) that he file a statement reciting that his duties "do not involve selling to the government in violation of the statutes and policies cited in the regulation received" (DD Form 1357, App. B, *infra*, p. 8a). In order to seek judicial remedy petitioner filed suit in the United States District Court for the District of Columbia against the Secretary of Defense, the Secretary of the Navy, and the Attorney General seeking preliminary injunction and a declaratory judgment holding the regulation to be a nullity and 18 U.S.C. 281 to be unconstitutional and for a further declaration that the construction made by defendants of 18 U.S.C.

281 in the DOD Directive was in error and that the statute as correctly construed did not impose criminal penalties on regular retired officers who represented persons in sale to the department in which they held their retired status (JA 10, 11, 46). The complaint alleged *inter alia* that the Secretaries of Defense and the Navy had exceeded their constitutional and statutory authority in the premises (JA 7, 9) and that 18 U.S.C. 281 was unconstitutional as vague and indefinite (JA 7). In regard to the preliminary injunction petitioner moved for the convocation of the three-judge court. The defendants opposed and moved to dismiss or in the alternative for summary judgment, both of said motions resting on the ground that the court lacked jurisdiction over the subject matter by reason of lack of standing to sue and failure to present a case or controversy (JA 18). The lower court denied the motion for a three-judge court filing an opinion in connection therewith (JA 28). The appellant moved to reconsider this order and moved for summary judgment. The District Court by fiat denied the motion to reconsider and by order granted appellees' motion for summary judgment and dismissed the action (JA 47). The petitioner then appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals on April 6, 1964, entered a judgment reciting:

> "* * * that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed. See *Kennedy* v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 F. 2d 181 (1963), affirmed on other grounds, ... U.S. .... (March 30, 1964)."

This petition for certiorari followed.

The District Court had jurisdiction in this action under the Declaratory Judgment Act, 62 Stat. 964, as

amended, 63 Stat. 105, 28 U.S.C. 2201, 2202; and under the Administrative Procedure Act, 5 U.S.C. 1009; and under Secs. 11-305, 306, D. C. Code (1961 ed.).

The Court of Appeals had jurisdiction to hear the appeal under provisions of 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

The writ should issue because the United States Court of Appeals for the District of Columbia Circuit has, through the erroneous use of the jurisdictional doctrine of the unconsented suit against the United States, in conflict with applicable decisions of this court, affirmed the dismissal of a cause presenting a substantial question of federal law which has not been, but should be, decided by this court. The substantial question is whether or not a directive of the Secretary of Defense barring retired officers of the regular military service for life from the legitimate business of representing persons in the sale of anything to the service from which they were retired is in excess of and in contradiction to the statutory and constitutional authority of the Secretary of Defense. The cause has twice erroneously suffered dismissal on threshold grounds. The United States District Court for the District of Columbia dismissed the cause on summary judgment on the ground that the court lacked jurisdiction over the subject matter for failure of standing or the absence of case or controversy. The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court by per curiam order citing, however, its own decision in *Kennedy* v. *Rabinowitz*, 115 U.S. App. D.C. 210, 318 Fed. 2d 181, which it had determined on the ground of unconsented suit against the sovereign. The dismissal of such an action

on this threshold theory of federal jurisdiction not only uses again a highly questionable[1] concept which this Honorable Court specifically declined to pass upon or use as a basis of decision in its own review of the same case, *Rabinowitz* v. *Kennedy*, ... U.S. ...., 32 L.W. 4264 (March 30, 1964), but expanded it to cover circumstances involving administrative action in excess of statutory and constitutional powers in contradiction to established decisions of this court. Such a situation has never given rise to the doctrine of unconsented suit nor precluded suits against officials so acting in excess of constitutional or statutory authority, *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951)); *Stark* v. *Wickard*, 321 U.S. 288, 290; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94. This right to sue federal officials has been applied in such a far-ranging variety of circumstance that it cannot now be even subject to debate. See, e.g., the validity of a harbor line set by the Secretary of War, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605; classification of a railroad by the Interstate Commerce Commission, *Shields* v. *Utah R.R. Co.*, 305 U.S. 177; the issuance of passports by the Secretary of State, *Perkins* v. *Elg*, 307 U.S. 325; *Kent* v. *Dulles*, 357 U.S. 116; discharge of government employees, *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Cole* v. *Young*, 351 U.S. 536; *Peters* v. *Hobby*, 349 U.S. 331; *United Public Workers* v. *Mitchell*, 330

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[1] See Borchard, *Declaratory Judgments* (2 ed. 1941) at 906, 1020, 1021; Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445 (1943); Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damage*, 40 Cornell L.Q. 3 (1954); Davis, *Suing the Government by Suing an Officer*, 29 U. Chi. L. Rev. 435 (1962); Jaffe, *Suits Against the Government and Officers; Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

U.S. 75; character of an Army discharge, *Harmon* v. *Brucker,* 355 U.S. 579; the classification of hearing examiners, *Ramspeck* v. *Fed. Trial Examiners,* 345 U.S. 128; veterans' preferences in retention in government service, *Hilton* v. *Sullivan,* 334 U.S. 323; the lease of public lands, *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U.S. 621; test affecting the import of tea, *Waite* v. *Macy,* 246 U.S. 606.

Particularly is the doctrine inapplicable to the peculiar circumstances of this case. Here the appellant, a retired naval officer, has been and is being prevented, to his irreparable injury, from engaging in his chosen legitimate profession by an order of the Secretary of Defense, implemented by an instruction of the Secretary of the Navy, prohibiting him as a retired officer from representing anyone in the sale of anything to or through the Navy Department.[2] This prohibition is special, and in addition to the strictures of the comprehensive Conflict of Interest Statute which apply to the appellant and to all other citizens who have in the past served the United States on active duty in or out of uniform. (P.L. 87-849, 87th Congress, 76 Stat. 119). The Secretary of Defense does not himself purport to have originated such a ban but sets it in his directive because he believes that the Congress has by a Conflict of Interest Statute declared such act of selling by a regular retired officer to be a criminal offense (18 U.S.C. 281). Having thus placed the blame upon the Congress, the Secretary then takes his own steps administratively to enforce his interpretation of the statute independently of any action connected with a criminal prosecution. He specifies the acts and con-

[2] DOD 5500.7 dated May 17, 1963, 28 Fed. Reg. 5666 (1963); SEC. NAV. INST. dated 6 June 1963.

duct which he believes that the criminal statute prohibits. He then orders regular retired officers to forbear from the acts which he believes prohibited by statute and orders each such officer to file a statement declaring that he is not violating the provisions, and listing his employers, his employers' products, his title, and his duties.

At least a partial purpose of the action is obviously to place a retired officer who might be "selling" in the dilemma of subjecting himself to court martial for refusal to obey an order if he does not sign or cannot without perjury sign such a statement, and to incriminate himself in violation of Fifth Amendment rights, and to incriminate his employer and subject himself to perjury indictment, if he does. Since the Secretary is also the buyer of the materials involved in any relevant sale and the accuser in any prospective court martial, the absolute effect of the promulgation of the order on the individual retired officer is obvious.

A review of the statute shows that the Secretary's interpretation is wrong under the canons of statutory construction, the ordinary standards of constitutional interpretation, and the legislative history; that the error of the Secretary is the fundamental one of finding that the Congress has created a crime tailored only to the regular retired officers of the military service where the Congress cannot have constitutionally intended to do any such thing; that the Secretary's interpretation of the statute renders it unconstitutional, as vague, indefinite, and discriminatory; and that the administrative application to him of the statute as so interpreted is in excess of the Secretary's powers and violates appellant's rights under the Fifth Amendment to the Constitution.

The crux of the problem can be briefly described. The statute which the Secretary of Defense interpreted and applied in his directive to bar the appellant from his means of livelihood recites as follows:

> "Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer, or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United Sattes.
>
> *"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.*
>
> "This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress." [June 25, 1948, c. 645, § 1, 62 Stat. 697; May 24, 1949, c. 139, § 6, 63 Stat. 90; *repealed* by Act Oct. 23, 1962, P.L. 87-849, § 2, 76 Stat. 1126, "*except as* [*it*] *may*

apply to retired officers of the armed forces of the United States."] (Emphasis added.) 18 U.S.C. 281

The first paragraph is, of course, the text of the old Conflict of Interest Act of June 11, 1864, (13 Stat. 123). The first two italicized sentences are an amendment added in 1940 (54 Stat. 1021), occasioned by the holding of the United States Court of Appeals for the District of Columbia that retired officers of the regular services were "officers" within the meaning of the old statute, *Morganthau* v. *Barrett*, 71 App. D.C. 148, 108 F. 2d 481, cert. den., 309 U.S. 672 (1939), and the final italicized sentence with its speculative verb "may" is the 1962 repeal. The contradictory nature of the two sentences of the 1940 amendment with the use of the permissive verb "allow" in the second sentence have given rise to two antithetical interpretations within the Department of Defense itself. One is that expressed by the Judge Advocate General of the Navy in 1959,

> "Now, in construing this and interpreting it for the Navy, I have held that it is not a prohibition. It is, in effect, a saving clause, to protect the civil statutes which prohibit the sale—the participation of retired officers in selling to agencies of the Department of Defense."[3]

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[3] Testimony of Rear Admiral Chester Ward, Judge Advocate General of the Navy, before the hearings, Subcommittee for Special Investigation, House Committee on Armed Services, 86th Cong., 1st Sess., at 944 (1959) (the Hebert committee); see also Op. JAGN JAG:134.2 PEH:AN May 16, 1960; Op. JAGN 134.1:RWC:sb July 12, 1962; and *Reference Guide to Employment Activities of Retired Naval Personnel*, published by the Department for the Navy, Office of the Judge Advocate General, 21 March 1963, p. 21.

The Navy JAG is here referring to two civil statutes which had for years come before the attention of the Congress in the process of re-enactment or amendment and which provided that retired officers would not be paid their retired pay during any time that they were engaged in selling material or supplies to the service from which they were retired.[4]

This interpretation was reinforced by the language of the committee report on the 1940 amendment (H.Rep. 2330, 76th Congress, 3rd Session) which after referring to the second sentence,

> "The amendment by the committee is intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department. It applies only to representation in the actual sale of goods, and does not apply to employment and the other activities of any corporation or other persons such as manufacturing."

went on to describe the effect intended for the whole amendment in language completely disavowing any

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[4] "• • •

No payment shall be made from money appropriated in this Act to any officer on the retired list of the Army who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Army, or the War Department any war materials or supplies. • • •"

Military Appropriation Act of 1941, Act of June 13, 1940, 54 Stat. 350, 355

"• • • That no payment shall be made from appropriations made by Congress to any retired officer in the Navy or Marine Corps who for himself or for others is engaged in the selling of, contracting for the sale of, or negotiating for the sale of, to the Navy or the Navy Department any naval supplies or war material." Act of July 22, 1935, 49 Stat. 487, 490, amending Act of June 10, 1896 (29 Stat. 361).

leglislative purpose to create or continue application of the criminal code in special detail to retired officers of the regular service,

"The only effect of this bill will be to extend to retired officers not on active duty the same exemptions from the operation of Section 113 as were extended to Reserve officers by the Act of July 1, 1930 (46 Stat. 841).

"This bill does not involve any expenditure by the Government nor will its enactment jeopardize any interest of the Government. Though a part of the Military Establishment, retired officers not on active duty—the only class to which this bill applies—are more nearly in a civil than a military status. They have no military duties to perform and though in time of war they may be called to duty without their consent, this is a contingency to which every citizen is subject. In time of peace, their status is no different from that of citizens generally. And as said by the Court of Appeals, their 'activities are wholly separated from official life.' It is absurd, therefore, to think that retired officers, particularly while not on active duty, as such, can exert any undue influence in the departments or bureaus, or with commissions, agencies, or instrumentalities of the Government, or with any officer therewith connected. The time of retired officers not on active duty is their own. There is no loss of time to the Government, through their employment by private interests, as there is in the case of officers and employees on active duty whose whole time belongs to the Government. As the primary purpose of the statute seems to be to discourage the use of undue or sinister influence by those in a position to exert it, and to prevent the loss to the Government of time for which officers and employees are paid by the Government, and neither of these reasons can have any application to retired officers

not on active duty, there appears to be no good reason why they should not be exempted from the provisions of Section 113 of the Criminal Code, as proposed in this bill."

The other interpretation is that upon which the current directive of the Secretary of Defense is based. It imputes to the Congress the intent to classify the retired officers of the regular services into a special category different from reserve officers not on active duty, from other retired personnel of the federal service of any variety, and different indeed from any other citizen not in the active service of the United States. It presumes a congressional purpose to find in the case of the regular retired officer a singular, class disposition to the use of undue or sinister influence sufficient to require the imposition of severe criminal penalties. It should be a sufficient answer to note that the legislative report hereinabove quoted specifically denies any intent on the part of the Congress to attribute such an evil disposition to retired officers not on active duty, or to discriminate against them in this regard without basis in violation of their Fifth Amendment rights. Furthermore, if it were fair to assume that the interpretation of the Secretary was tenable as an abstract matter it would still make no difference. In that event there would exist two interpretations reasonably held and every interpreting authority, be it court or administrative official, would be compelled on constitutional grounds to reject the construction which creates a criminal offense in favor of the interpretation which does not.

"* * * Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a common sensical meaning. But

> when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal CIT Credit Corp.*, 344 U.S. 218, 221, 222, 73 S. Ct. 227; see also *Connolly* v. *General Construction Co.*, 269 U.S. 385, 392.

In further demonstration of the ambiguous character of the statute, it is noted that virtually every administrative official cognizant of the problem has either conceded the ambiguity,

> "The statutes are confusing and I believe could be clarified. But I understand they over-run into a whole series of other laws. I do feel they are somewhat ambiguous. * * *"
>
> Testimony of Deputy Secretary of Defense Thomas F. Gates, Hebert Committee Hearings, supra, p. 11.

or declared themselves incapable of solving the controversy involved,

> "SENATOR ERVIN: I am not quite familiar with the proposition, but I received a communication from a retired military officer objecting to certain passages of the bill, and indicating that the situation respecting retired officers should be clarified.
>
> "I was unable to be here when you began your testimony and do not know whether you touched on that—"
>
> "MR. KATZENBACH: I testified only, Senator, that we left the situation of retired military officers exactly where it stood. Now to be perfectly candid about that, we did so because it has been a matter

of controversy for some time and we did not feel capable of resolving that problem. So, we left it as is."

> Testimony of Deputy Attorney General Nicholas DeB. Katzenbach (Hearing before the Committee on the Judiciary, U.S. Senate, 87th Congress, 2nd Session on H.R. 8140 (1962) at page 29.)

or presented a theory of curing ambiguities in the criminal statute through the device of administrative definition of questionable terms.

> "As this Committee well knows, one of the most serious problems involved in the conflict-of-interest area is determining those activities which constitute a sale. Sec. 281 uses the term 'sale' without any further elaboration and as far as we know this term has never been judicially construed. After careful consideration, the Air Force, approximately 10 years ago, adopted the following regulation for guidance. This is Para. 5(b) of Air Force Regulation 3030, and it is on the Air Force Blue Tabs, No. 2, in that digest (quoting same). It will be noted that this definition is quite close to the definition of selling activities recently given by the Comptroller General in the case of the Navy beer salesman (38 Comp. Gen. 470).
>
> "Admittedly, these definitions are not precise and would not be appropriate for inclusion in a criminal statute. Our best view is that perhaps the matter of definition should be left to regulation."
>
> Testimony of Mr. Max Golden, General Counsel of the Department of the Air Force, before the Hebert Committee, supra, p. 967.

The only support by the judiciary for the criminal interpretation of 18 U.S.C. 281 as applied to re-

tired officers is found in *Gillilan* v. *U. S.*, (2d cir.) 288 Fed. 2d 796, cert. den. sub. nom. *Apex Distributing Co. Inc.* v. *U. S.*, 368 U.S. 821, in which the court, however, reversed the conviction for the reason that the lower court had not defined "selling" in its charge to the jury. The court, however, did not assist by any definition of its own in this regard.

It is submitted from the foregoing that no conceivable question of sovereign immunity is presented. The Secretary of Defense cannot be considered the alter ego of the sovereign when he attempts by administrative order to create a crime where the Congress had intended no crime to exist or where he applies a statute, which as interpreted by him, is unconstitutional. Certainly, the fact that there is involved a criminal rather than a civil statute creates no problem of sovereign immunity. *Philadelphia Co.* v. *Stimson, supra; Shields* v. *Utah R.R. Co., supra.* The only problem arising from the fact that a criminal rather than a civil statute is involved in an equitable proceeding is that of adequacy of remedy at law in a criminal trial. Here, however, there is no adequate remedy at law for it is the force of the administrative prohibition against selling which inflicts the injury independent of any question of criminal prosecution. Should the doctrine of sovereign immunity insulate an administrative official from suit in such an instance it would be tantamount to countenancing the administrative equivalent of a bill of attainder, *U. S.* v. *Lovett,* 328 U.S. 303.

Neither are the grounds of failure of standing or lack of case or controversy, which the District Court adopted, of any merit.

This appellant has standing to sue in that his stake in the argument is personal, *Baker* v. *Carr,* 369 U.S.

186; he is deprived of a valid property right, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86; in his means of livelihood, *Truax* v. *Raich*, 239 U.S. 33; and in his business or profession, *Green* v. *McElroy*, 360 U.S. 474. He has as well been ordered from time to time to sign a statement, vague and uncertain in character, that he is forbearing from doing what the Secretary has in error and in excess of law prohibited, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Baggett* v. *Bullitt*, — U.S. —, 32 L.W. 4425 (June 1964). The effective prohibition is current and active rendering his case ripe for decision. In summary the theories adopted by the lower court in dismissing the action of the appellant on threshold jurisdictional grounds constitute clear error. The cause is one of substance which should be heard on the merits and determined on the merits by this Honorable Court.

Respectfully submitted,

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